No. 82-1832

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TOWN OF HALLIE, TOWN OF SEYMOUR,
TOWN OF UNION AND TOWN OF WASHINGTON,
Petitioners,

v.

CITY OF EAU CLAIRE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICI CURIAE BRIEF FOR THE COMMONWEALTHS OF VIRGINIA AND PENNSYLVANIA AND THE STATES OF NEVADA, CONNECTICUT, MINNESOTA AND UTAH

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INTEREST OF THE AMICI STATES

The Commonwealth of Virginia and five of her sister states,[1] by their Attorneys General, submit this brief in support of respondent, the City of Eau Claire, Wisconsin. The states have a significant interest in the outcome of this case.

A paramount interest of the amici states is to maintain a workable structure for state-local relations. There are more than 67,000 units of local government in the United States.[2] Each local government exists in an environment

[1] The Commonwealth of Pennsylvania and the States of Connecticut, Minnesota, Nevada, and Utah.

[2] This figure includes municipalities, counties, townships, and special districts. It excludes school districts. U.S. Department of Com-

shaped by state law. Most, if not all, engage in activities which affect local, regional, or national commerce. In determining whether those activities run afoul of the Sherman Act, the courts have focused repeatedly on state law to determine the level of state authorization for the challenged activity. Consequently, the undersigned states urge the adoption of a rule which affords reasonable protection to local activities without mandating a massive revision of state law. Further, the states urge adoption of a test which recognizes the tremendous burden imposed upon the states if they are required to engage in "active supervision" of local activity.

Of equal significance is the states' interest in vigorous enforcement of the antitrust laws. Localities engage in a panoply of activities which displace free operation of the market. Those activities range from purely commercial enterprises in which government is a market participant to regulatory activities involving the provision of public services. Activities lying at the core of a local government's power to regulate public health, safety, and welfare should be protected from Sherman Act scrutiny. Unless and until Congress establishes an exemption from antitrust liability for units of local government, the Court should reconcile the national policy favoring competition and the longstanding principle of federalism by affirming the holding of the court below.

SUMMARY OF ARGUMENT

This Court's decisions in the field of state action immunity fall along a continuum which reflects the sovereign status of the party whose conduct is challenged. In determining the appropriate test for applying the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), to municipal conduct, the Court should recognize that the states often choose to implement policies which displace competition through their cities, counties, or towns. State law, to confer sufficient sovereignty upon a municipality, should authorize rather than compel the challenged conduct. The anticompetitive consequences of the authorized conduct should be a reasonably foreseeable consequence of the state's authorization. The Seventh Circuit properly employed these rules in finding that the respondent City of Eau Claire's conduct was protected by the *Parker* doctrine.

The court below was also correct in rejecting active state supervision of the municipality's conduct. Active supervision is a requirement imposed by the courts to ensure that a private party does not abuse its state authorization to displace competition. The active supervision requirement is inappropriate for municipalities because independent political constraints check the abuse of local power and because imposition of such a requirement would undermine the efficient operation of state and local government.

merce, Bureau of the Census, *Governmental Units in 1982*, 1982 Census of Governments, Preliminary Report No. 1 (June 1982).

ARGUMENT

I. The Court Should Adopt A Municipal Action Test Consistent With The Federalism Rationale Of *Parker v. Brown*, Requiring Clear Authorization For The Challenged Conduct And Requiring That The Anticompetitive Consequences Of The Authorized Conduct Be Reasonably Foreseeable.

A. *The State Action Doctrine Is Based On The Concept Of Federalism.*

The state action doctrine evolved as a means of resolving the tension between the mandate of the Sherman Act and the power of the states to regulate commerce. As this Court

pointed out in the seminal state action case, the principle of federalism lies at the heart of the doctrine:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Parker v. Brown, 317 U.S. 341, 350-51 (1943).[3] *See also City of Lafayette v. Louisiana Power and Light*, 435 U.S. 389, 399-400 (1978) (discussing policy underlying *Parker*'s "implied exclusion" from the antitrust laws); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980) ("immunity for state regulatory programs is grounded in our federal structure").

Notwithstanding the various labels applied to the *Parker* doctrine (exemption, immunity, implied exclusion, or preemption), it is clear that the doctrine has not afforded municipalities the protection it offers to states. In its first opportunity to address a claim of antitrust immunity by a city, the Court stated that extension of the *Parker* doctrine to municipalities would "be inconsistent" with the federalism rationale underlying *Parker*. *City of Lafayette*, 435 U.S.

[3] *Parker* and its rationale have been reconsidered recently by commentators who point out that the case stands as an anomaly in light of this Court's cases construing the Supremacy Clause. *See, e.g.*, M. Conant, *The Supremacy Clause and State Economic Controls: The Antitrust Maze*, 10 Hastings Con. L. Q. 255 (1983); G. Werden and T. Balmer, *Conflicts Between State Law and the Sherman Act*, 44 U. Pitt. L. Rev. 1 (1982); S. Levmore, *Interstate Exploitation and Judicial Intervention*, 69 Va. L. Rev. 563, 626-29 (1983). *See also Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 60-71 (1982) (Rehnquist, J., dissenting).

389, 412. The Court went on to note that "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them." *Id.*

In *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982), *City of Lafayette*'s distinction between the sovereign status of state government and that of local government was reaffirmed. *City of Boulder* involved a Sherman Act attack on an emergency ordinance temporarily prohibiting an existing cable television franchisee from expanding its business into new areas of the city. The city relied upon the Colorado Home Rule Amendment, asserting that the constitutional grant of home rule power by the state was sufficient to elevate Boulder to "sovereign" status for purposes of applying the *Parker* doctrine. 455 U.S. at 52-53. The city's contention was rejected, and the Court reasserted its adherence to principles of federalism, of *dual* sovereignty, which cannot be shared by cities. *Id.* at 53-54.

This reasoning has obvious practical consequences. If a municipality is to shield itself from Sherman Act scrutiny, it must show that it wears the mantle of state sovereignty. The Court's state action cases have provided some guidance to lower courts examining a municipality's claim that it shares sovereignty, but have left significant questions unanswered.

B. *City Of Lafayette And City Of Boulder Suggest General Parameters, But Not A Complete Test, For Authorization Of Anticompetitive Municipal Conduct By The Sovereign.*

To date, the Court has decided nine cases which discuss the type of authorization necessary to shield governmental entities and private parties from antitrust attack.[4] Two gen-

[4] *See Parker v. Brown*, 317 U.S. 341 (1943); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Cantor v. Detroit Edison Co.*, 428

era! rules have emerged with relative clarity. First, the state, acting legislatively through its legislature or supreme court is *ipso facto* exempt from operation of the antitrust laws. *Hoover v. Ronwin,* 104 S.Ct. 1989, 1995 (1984). *See Bates* v. *State Bar of Arizona,* 433 U.S. 350, 360 (1977); *Parker v. Brown,* 317 U.S. 341, 350 (1943). Second, private parties, because they possess no attributes of sovereignty, must satisfy a more stringent test. In *Midcal,* the Court stated a two-part test for identifying private conduct which is beyond the scope of the Sherman Act: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 105 (1980).[5]

It is clear that private conduct occupies one end of the "sovereignty continuum" and that legislative activity of a state occupies the other.[6] Between the two ends of this continuum falls the conduct of local governmental units. In *City of Lafayette* and *City of Boulder,* the Court discussed the means by which local government may partake of state sovereignty for Sherman Act purposes.

City of Lafayette was the first and most cogent review

U.S. 579 (1976); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *City of Lafayette v. Louisiana Power and Light,* 435 U.S. 389 (1978); *New Motor Vehicle Board of California v. Orrin W. Fox Co.,* 439 U.S. 96 (1978); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980); *Community Communications Co., Inc. v. City of Boulder,* 455 U.S. 40 (1982); *Hoover v. Ronwin,* 104 S.Ct. 1989 (1984).

[5] The "active supervision" prong of the test is discussed below in Part II.

[6] *See United States v. Southern Motor Carriers Rate Conference, Inc.,* 672 F.2d 469 (5th Cir. 1982) *cert. granted,* 52 U.S.L.W. 3891 (U.S. June 11, 1984) (No. 82-1922) (discussing state action decisions of this Court as falling along a continuum).

of the municipal branch of the *Parker* doctrine. Justice Brennan's plurality opinion accepts the postulate that state action is a doctrine based in federalism. *City of Lafayette,* 435 U.S. at 412-13. However, his opinion recognizes that local units of government may be "instrumentalities of the State for the convenient administration of government." *Id.* at 413. Justice Brennan concluded "that the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." *Id.*

City of Lafayette suggests the following parameters for determining whether municipal action reflects a state policy to displace competition with regulation or monopoly public service: (1) the state must "authorize or direct" a municipality to engage in the challenged conduct, *Id.* at 414, (2) a "neutral" state policy toward the challenged conduct is insufficient to confer the necessary degree of sovereign power, *Id.,* (3) a political subdivision need not "be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit," *Id.* at 415, (4) an adequate state mandate for anticompetitive activities of cities may be found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *Id.*[7]

Unfortunately, the Court was not required to apply these concepts rigorously in *City of Lafayette.* The city had argued that, by virtue of its mere status, it was protected from

[7] In his concurrence, the Chief Justice accepted the general proposition that states may displace competition with regulation, but suggested two added requirements for municipal immunity: first, that the state compel the anticompetitive activity, and second, that the activity be essential to the state's regulatory plan. *City of Lafayette,* 435 U.S. at 425 n.6 (Burger, C.J., concurring).

the antitrust laws. *Id.* at 392. Because that threshold contention was rejected, the Court did not engage in close scrutiny of the relevant state statutes.

City of Boulder was a relatively simple application of *City of Lafayette*'s teachings, reiterating the admonition that mere state neutrality is insufficient to confer sovereign authority upon a unit of local government. The Colorado Home Rule Amendment at issue in *City of Boulder* transferred general authority to cities to operate autonomously. That transfer of power permitted cities to provide cable television in a number of ways, ranging from monopoly public service to free market competition. The city's ambivalent state law environment reflected Colorado's position of "precise neutrality" and Boulder's claim of immunity was rejected.

Perhaps the most noteworthy aspect of *City of Boulder* was the following language in the majority opinion:

> The [*Lafayette*] opinion emphasized, however, that the State as sovereign might sanction anticompetitive municipal activities and thereby immunize municipalities from antitrust liability. Under the plurality's standard, the *Parker* doctrine would shield from antitrust liability municipal conduct engaged in 'pursuant to state policy to displace competition with regulation or monopoly public service.' 435 U.S., at 413. This was simply a recognition that a State may frequently choose to effect its policies through the instrumentality of its cities and towns. It was stressed, however, that the 'state policy' relied upon would have to be 'clearly articulated and affirmatively expressed.' *Id.*, at 410. This standard has since been adopted by a majority of the Court. *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

City of Boulder, 455 U.S. at 51 (footnote omitted). A majority of the Court now agrees that the first prong of *Midcal* generally applies in determining when sovereign power has been passed to local government.

City of Lafayette and *City of Boulder* left two important questions unresolved: (1) how strong must the state's articulation of policy to displace competition be, *i.e.*, must it *compel* local conduct or merely *authorize* it? (2) how specifically must the state anticipate the anticompetitive consequences of the compelled or authorized conduct? The court below addressed these issues, resolving them within the boundaries defined by *City of Lafayette*.

C. *The Court Below Fashioned A Workable State Authorization Test For Municipal Activity.*

The Seventh Circuit held that state compulsion of a challenged municipal regulatory activity is not required to protect that conduct from Sherman Act scrutiny. The court's reasoning on this point is particularly cogent:

> There has been a great deal of confusion over whether the state must compel a municipality to undertake an anticompetitive activity in order to receive immunity under *Parker*. This confusion arose because of language in *Goldfarb v. Virginia State Bar* [citation omitted] and *Cantor v. Detroit Edison Co.* [citation omitted], which appeared to require state compulsion as a prerequisite for municipal immunity. We conclude that state compulsion is not required. It is clear in *City of Lafayette* and *City of Boulder* that the only immunity available to municipalities is that derived from the immunity granted to the states in *Parker*. The critical inquiry is to determine if the anticompetitive conduct undertaken by a municipality constitutes state action. We hold that any municipality acting pursuant to clearly articulated and affirmatively expressed state policy which evidences

> an intent of the legislature to displace competition with regulation—whether compelled, directed, authorized, or in the form of a prohibition—is entitled to antitrust immunity because conduct pursuant to such a policy would constitute state action.

700 F.2d 376, 381. *Accord, U.S. v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469, 473 (5th Cir. 1982) *cert. granted*, 52 U.S.L.W. 3891 (U.S. June 11, 1984) (No. 82-1922) (compulsion required for private conduct but not for conduct of a public official or institution).

Assuming that authorization rather than compulsion of the challenged conduct is sufficient to cloak a municipality with state sovereignty, how specifically must that authorization anticipate the anticompetitive consequences of the conduct? The court below, adopting *City of Lafayette*'s common sense approach to the matter, stated: "if we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services, then we can assume that the state contemplated that anticompetitive effects might result from conduct pursuant to that authorization." 700 F.2d at 381.

Relying upon Professor Areeda's analysis, Judge Wisdom wrote: "If the state authorizes certain conduct, we can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity." *Id.* A similar test has been adopted recently by the Eighth Circuit which would find that "a sufficient state policy to displace competition exists if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity." *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1012-13 (8th Cir. 1983). *See* P. Areeda, *Antitrust Law* ¶ 212.3a, at 53-54 (Supp. 1982); *cf. Hybud Equipment Corp. v. City of Akron*, —— F.2d ——, 47 Antitrust and Trade Reg. Rep. (BNA) 419, 424-25 (8th Cir. August 24, 1984) (finding that regulatory power of city, in combination with authority of related state agency, reflected policy to displace competition).

The Seventh Circuit's treatment of these issues provides a principled means for accommodating the federalism rationale of *Parker* with the operational needs of local government. The states should not be required to transform units of local government into automatons in order to afford them reasonable protection from the antitrust laws. Obviously, the Wisconsin statutes reviewed by the court below indicated more than "mere neutrality" toward Eau Claire's decision to condition sewage treatment service upon annexation.[8] The petitioners labor mightily to obscure the plain import of the Wisconsin statutes which authorize the city's challenged conduct. Brief of Petitioners at 30-38. In reality, petitioners would require the State of Wisconsin to enact the "specific, detailed legislative authorization" eschewed in *City of Lafayette*.

Adoption of the petitioners' rule would lead to chaos in state legislatures throughout the country. Exaggerated fears of antitrust exposure triggered by the *City of Boulder* decision have already led municipalities to seek unnecessarily

[8] Wisconsin law contains a number of provisions granting localities the power to construct and operate sewage services. The court below focused on Wis. Stat. §§ 196.58(5) and 66.076(8). The Seventh Circuit was aided in its interpretation of these statutes by opinions of the Wisconsin Supreme Court construing the legislative purpose behind the sewage disposal scheme. In a prior state court antitrust action brought by the Town of Hallie, the Wisconsin Court noted that "the legislature viewed annexation by the city of a surrounding unincorporated area as a reasonable *quid pro quo* that a city could require before extending sewer services to the area. . . ." 700 F.2d at 383, quoting *Town of Hallie v. City of Chippewa Falls*, 105 Wis.2d 533, 314 N.W.2d 321, 325 (1982).

detailed legislative authorization for numerous activities. *See, e.g.*, Va. Code § 15.1-23.1 (community antenna television systems); Md. Ann. Code Art. 23A § 3 (Supp. 1983) (power of municipal corporation to displace competition).[9] The energies of municipal officials and state legislators should not be wasted upon the concoction of statutory formulas which serve the sole purpose of protecting cities from Sherman Act liability.

II. The Court Should Adopt A Municipal Action Test Which Recognizes The Practicalities Of State-Local Relations, And Reject The Active Supervision Requirement Which Has Been Applied To Private Conduct.

A. *Private Conduct Requires Active Supervision By The State, To Check Abuses Of The Sovereign Power to Displace Competition.*

When the anticompetitive conduct of a sovereign state is challenged, this Court has held that the state is immune from the Sherman Act by virtue of its status alone. *Hoover v. Ronwin*, 104 S.Ct. 1989 (1984). The anticompetitive conduct of a non-sovereign party, to be shielded from Sherman Act scrutiny, must be authorized by the sovereign by means of a clear articulation and affirmative expression of state policy to displace competition. With regard to private, non-governmental parties, an additional element is added to the test. The challenged conduct of a private party must be actively supervised by the state itself. *Midcal*, 445 U.S. at 105. This distinction between state conduct and private

[9] The fear of antitrust exposure has also led municipalities to Congress, where they have sought legislation to establish a municipal antitrust exemption, or, alternatively, to limit the remedies available against municipalities. *See* Senate Committee on the Judiciary, *The Local Government Antitrust Act*, S. Rep. No. 593, 98th Cong., 2nd Sess. (1984) (background and analysis of S. 1578); House Committee on the Judiciary, *Local Government Antitrust Act of 1984*, H. Rep. No. 965, 98th Cong., 2nd Sess. (1984) (background and analysis of H.R. 6027).

conduct has been recognized in this Court's post-*Midcal* decisions. *See City of Boulder*, 455 U.S. at 51; *Hoover v. Ronwin*, 104 S.Ct. at 1995-96.

Once again the fundamental federalism rationale of *Parker* is reflected in the rule. The Sherman Act is a broad condemnation of restraints of trade which affect interstate commerce. Private parties, which are not entitled to the deference of states under our Constitution, should not be permitted to escape Sherman Act liability by interposing the existence of a one-time grant of state authority. In order to ensure that the state's policy to displace competition is carried out by the least intrusive means, the Court has required "pointed reexamination" of the authorized conduct of private parties. *Midcal*, 445 U.S. at 106 (state failure to monitor market conditions requires invalidation of price maintenance program). *See also New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 110 (1978) (ongoing regulatory supervision cures "interim" restraints resulting from dealer objections to market entry by competitors). *See generally* 1 P. Areeda and D. Turner, *Antitrust Law* ¶ 213(a) (1978).

B. *The Seventh Circuit Properly Rejected The Active Supervision Requirement For Municipal Conduct.*

In *City of Boulder*, this Court reserved the question of the applicability of the "active supervision" requirement to municipal conduct. 455 U.S. at 51 n.14. The court below, along with other federal courts, has considered the "active supervision" requirement in cases alleging restraints of trade by municipalities. Overwhelmingly, the requirement has been rejected. In the case at bar the Seventh Circuit offered the following reasoning:

> We do not conclude that *Midcal* requires active state supervision over the conduct in this case. The *Midcal*

> case involved private parties that were given power over price and that were free of state supervision. In this context, the requirement of active state supervision ensures that the private parties not abuse the anti-competitive power given to them and act pursuant to the state policy at stake. This case involves a local government performing a traditional municipal function. Supervision is unnecessary because local governments operate pursuant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority. If the conduct of local government in providing municipal services is authorized by the state and is clearly articulated and affirmatively expressed as state policy, the activity is state action and entitled to immunity even though state supervision does not exist.

700 F.2d at 383-84 (footnotes omitted).

This distinction between the conduct of private entities and that of local government has been recognized by other circuits as an appropriate rationale for rejecting active supervision of authorized local activity. Independent political constraints not applicable to private conduct act as a check on local government's exercise of the power to displace competition. The Eighth Circuit notes that:

> [T]he state supervision requirement is intended to control the potential for abuse created by authorizing private persons to make anticompetitive decisions and to insure that those decisions are consistent with the clearly articulated and affirmatively expressed state policy at stake. Because municipal officials generally are politically accountable to the citizens they represent for their decisions regarding the challenged restraint, state supervision is not as necessary to prevent abuse as in the private context.

Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005, 1014 (8th Cir. 1983). *See also Central*

Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency, 715 F.2d 419, 428 (8th Cir. 1983).

Imposition of an active supervision requirement for municipal action would impose a tremendous burden on state government. The Ninth Circuit, echoing an argument raised in Justice Rehnquist's *City of Boulder* dissent, notes the following:

> A requirement of active state supervision would erode local autonomy. It makes little sense to require a state to invest its limited resources in supervisory functions that are best left to municipalities. As Justice Rehnquist observed, "[i]t would seem rather odd to require municipal ordinances to be enforced by the State rather than the City itself." *Community Communications Co. v. City of Boulder*, 455 U.S. at 71, n.6, 102 S.Ct. at 851, n.6 (Rehnquist, J. dissenting).

Golden State Transit Corporation v. City of Los Angeles, 726 F.2d 1430, 1434 (9th Cir. 1984).

C. *If This Court Determines That Active Supervision Is Appropriate For Some Categories Of Municipal Conduct, It Should Limit The Active Supervision Requirement To Local Functions Outside Of Traditional Health And Safety Areas.*

In rejecting active state supervision of municipal conduct, the court below limited its holding:

> We hold, therefore, that a state is not held to the high standard of active supervision of the conduct of a city performing a traditional municipal function for that city to receive *Parker v. Brown* immunity.

700 F.2d at 384 (footnote omitted). Judge Wisdom reserved the question "whether a municipality undertaking anticompetitive activity that falls outside the scope of a

traditional governmental function must be actively supervised by the state to receive *Parker v. Brown* immunity." *Id.* at 384 n.18.

In applying the *Parker* doctrine to Missouri's authorization of monopoly municipal ambulance service, the Eighth Circuit stated:

> The provision of ambulance service by Kansas City is a traditional governmental function designed to protect public health and safety. *See* Note, The Supreme Court, 1981 Term, 96 Harv. L. Rev. 268-278 (1982). We need not address the question of whether municipal conduct which is outside the scope of such a traditional governmental function and which may pose a more significant threat to competition may require active state supervision to qualify for protection under the *Parker* doctrine. *Id.*

Gold Cross, 705 F.2d at 1014 n.13. *See also Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419, 428 (8th Cir. 1983) (refuse disposal operations a traditional municipal activity requiring no active supervision).

This focus on traditional municipal activities echoes the Chief Justice's concurrence in *City of Lafayette*, which distinguished proprietary from governmental functions. Although the distinction has been criticized as unworkable, it may be operating *sub rosa* in a number of municipal state action decisions. The distinction persists because it responds to an intuitive notion that some functions are central to the public purposes served by local government while others are simply business enterprises conducted in competition with private entities.

Adoption of a traditional function test for active supervision, of course, would leave municipalities with the

nagging problem of determining what is "traditional." Traditional functions may vary locally or regionally, and traditions change. One leading commentator on municipal law points out that:

> A municipal corporation is a public institution created to promote public, as distinguished from private, objects. . . . What is a public use or purpose has given rise to much judicial consideration, and courts, as a rule, have attempted no judicial definition of a public as distinguished from a private purpose but have left each case to be determined by its own peculiar circumstances. The modern trend of the decisions is to extend the class of public uses or purposes in considering the municipal activities sought to be included therein.

2 E. McQuillin, *The Law of Municipal Corporations*, § 10.31 at 819 (3rd ed. 1979).

Despite the difficulties of adopting a "traditional activity" test, the Court may be reluctant to jettison active supervision for all municipal activities. If so, the Court may properly find that the case at bar involves a traditional exercise of local power to protect public health and safety, and limit its holding to a rejection of active supervision for this type of function. The provision of sewage treatment services is within the police power of the state, acting through its local instrumentalities to protect public health. Moreover, sewage treatment is an area where underlying economic principles suggest declining costs per unit of output. Where this type of "public good" is involved, the Sherman Act's pro-competition policy is not strongly implicated, and the threshold for granting municipal immunity from the antitrust laws is appropriately relaxed. *See* P. Areeda, *Antitrust Analysis* ¶ 179 (3rd ed. 1981); *see also* J. Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust Cases*, 61 Tex. L. Rev. 481 (1982).

CONCLUSION

The Court should recognize the unique responsibilities and risks which attend the operation of local governmental bodies throughout the United States. Absent federal legislation establishing an antitrust exemption for units of local government, it is particularly important to establish rules guiding the day-to-day operation of these thousands of local entities. The court below properly considered the realities of government operation, and adopted a rule which gives appropriate weight to both the principle of federalism and the goals of the antitrust laws. For this reason, the judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

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TOWN OF HALLIE, ET AL.
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CITY OF EAU CLAIRE

I hereby certify that on this 14th day of September, 1984, in accordance with Rule 28 of the Rules of the Supreme Court of the United States, three copies of this brief amici curiae were mailed, first-class postage prepaid, to the following:

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